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No. 02-626

IN THE

Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF AMICI CURIAE THE NATIONWIDE PUBLIC PROJECTS COALITION, WEST VALLEY WATER DISTRICT OF CALIFORNIA, THE METROPOLITAN DENVER WATER AUTHORITY OF COLORADO, THE COBB COUNTY-MARIETTA WATER AUTHORITY OF GEORGIA, AND THE WHEELER RIDGE-MARICOPA WATER STORAGE DISTRICT OF CALIFORNIA IN SUPPORT OF PETITIONER

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The Nationwide Public Projects Coalition, headquartered in Colorado, the West Valley Water District of California, the Metropolitan Denver Water Authority, the Cobb County-Marietta Water Authority and the Wheeler Ridge-Maricopa Water Storage District of California, as *amici curiae*, respectfully submit this brief in support of Petitioner South Florida Water Management District.[1]

INTERESTS OF THE AMICI CURIAE

The *Amici* are cities, water and wastewater districts, and private entities that serve public agencies that provide essential services to the public. *Amici* believe that, if upheld, the Eleventh Circuit's *Miccosukee Tribe of Indians v. South Florida Water Management District* decision would require virtually all entities that transfer water through a managed water system to obtain Clean Water Act permits for every stage of the transfer. This has profound implications for the ability of *Amici's* members to provide public services in a timely and cost efficient manner.

The Nationwide Public Projects Coalition ("NPPC") is a not-for-profit association that is made up of regional and local government agencies that

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[1] The parties have consented to the filing of this brief. The *Amici* have filed letters of consent with the Clerk. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than the *Amici* and their counsel has made a monetary contribution to the preparation and submission of this brief.

are involved in water supply, flood control, irrigation, wastewater and stormwater management. These agencies represent some 15 million constituents, extending from Connecticut to California and from Alaska to Georgia. NPPC's goal is to represent the public's interest in ensuring that vital public infrastructure services are provided in a safe, timely, affordable, and environmentally-responsible fashion. Consisting predominately of public agencies and firms that provide services to the public sector, NPPC's members must ensure that a fair balance is achieved between environmental values and the essential needs of the public.

The West Valley Water District of California ("WVWD") is an independent special water district that serves a population of approximately 55,000 citizens. WVWD routinely engages in interbasin transfers of water through various diversion structures in order to address fluctuations of available water from WVWD's sources.

The Metropolitan Denver Water Authority ("MDWA") is a political subdivision and public corporation of the State of Colorado. MDWA is made up of 20 cities and special districts that provide municipal water and/or wastewater services for the Metropolitan Denver, Colorado area and serves more than 1.5 million persons. MDWA member agencies are dependent on a number of interbasin water transfers to meet the water needs of their constituents.

The Wheeler Ridge-Maricopa Water Storage District of California ("WRMWSD") is a political

subdivision of the state of California that encompasses 228 square miles of mostly agricultural land. WRMWSD relies upon interbasin transfers to supply the growing demand for water of landowners within its jurisdiction.

The Cobb County-Marietta Water Authority ("CCMWA") is a political subdivision of the State of Georgia that supplies water to more than 700,000 people in the rapidly growing Metro-Atlanta area. CCMWA relies on interbasin transfers to meet the water demand of the citizens it serves while addressing the hydrological cycles of its water sources and other downstream water demands.

The outcome of this case will have a profound impact on the collective interests of *Amici* and the public they serve. Interbasin water transfers through various diversion structures are a necessity for countless water districts across the Country, especially in areas where the demand for water outpaces historic, localized supply. By requiring water districts to obtain Clean Water Act[2] ("CWA"), permits for these routine and critical water transfers, the Eleventh Circuit's decision would exponentially increase the costs of regulatory compliance and – at the same time – reduce the flexibility water districts currently enjoy to obtain needed water from a variety of sources. Without doubt, the ultimate loser in this equation will be the consumer, who will face dramatically higher water costs in return for marginal to non-existent

[2] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2002).

environmental benefits. Indeed, such water quality issues are already being addressed under a different mandate of the CWA. Clear guidance from the Court is necessary to prevent further intrusion into such activities that traditionally have been, and should remain, outside the CWA's permit process.

SUMMARY OF ARGUMENT

1) All bodies of water have distinct constituents. Therefore, the 11th Circuit's interpretation of "addition of pollutants" would require a permit for virtually every inter-basin transfer of water. This will have a significant impact on a wide spectrum of water management activities that in no way "add" pollutants to the waters they transfer.

2) The 11th Circuit improperly merges regulation of point source and "non-point" source pollution. Under *Miccosukee*, a party that transfers water becomes responsible for its physical characteristics by doing nothing more than redirecting such water. This is inconsistent with the two distinct regulatory mechanisms established by Congress.

3) The 11th Circuit's interpretation of the CWA violates fundamental principles of federalism by usurping state power absent a clear statement of congressional intent. The states are adequately addressing the non-point pollution at issue in this case.

ARGUMENT

I. *MICCOSUKEE's* INTERPRETATION OF THE TERM "ADDITION OF POLLUTANTS" COULD HAVE A SIGNIFICANT ADVERSE EFFECT ON VITAL WATER SUPPLY, TRANSMISSION, TREATMENT AND DELIVERY SYSTEMS.

The CWA prohibits "the discharge of any pollutant" into waters of the United States, except as otherwise authorized under the Act. 33 U.S.C. § 1311(a). A "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A).[3] In *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11tn Cir. 2002) ("*Miccosukee*"), the Eleventh Circuit significantly expanded the definition of "addition of pollutants" to include situations where water is pumped from one water storage area into another as part of a water management system. Under *Miccosukee*, National Pollutant Discharge Elimination System ("NPDES") permits are required for virtually any water management transfer where water from one source would not have been depdsited in the receiving body "but for" the transfer.

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[3] The CWA defines "point source" in pertinent part as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel [or] conduit . . . ." 33 U.S.C. § 1362(14).

A. The Eleventh Circuit's "But For" Test Would Require NPDES Permits for Every Transfer of Water Within a Managed Water System Despite the Fact that the Constituents Transferred are Already in the Water and Are Not "Pollutants" Added from the Outside World.

While *Miccosukee* addressed a specific type of water transfer (pumping of water from one side of a levee to another), *Amici* submit that under the Eleventh Circuit's broad definition of "addition of pollutants," virtually all water management systems would require NPDES permits for individual diversion structures. Put simply, the Eleventh Circuit's decision could potentially require a NPDES permit for every point of transfer along a managed water system, even when the conveyance merely redirects the water without adding any pollutants. Such an interpretation of "addition of pollutants" virtually guarantees that public entities providing water services would be forced into the time-consuming and costly NPDES permit process, despite the fact that – under any rational definition of the term – these water transfers do not "add" any pollutants.

The CWA broadly defines the term "pollutant."[4] Given that every individual body of water contains distinct constituents, Brian J. Skinner & Stephen C. Porter, *Physical Geology* 283-85 (1987), the transfer of water from one source to another will inevitably result in the "addition of pollutants" under *Miccosukee's* rationale.

Because an immeasurable variety of sources contribute to a body of water's constitution, no two waters are identical – even within a unitary hydrologic system. *Id.* at 299-300. Each separate body of water naturally contains a hodgepodge of material in varying occurrence and proportion based on the particular sources that contribute to the water and the physical characteristics of the water body itself. *Id.*

This can be true even within a unitary water storage basin where, for example, topography or

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[4] Under the CWA, a "pollutant" includes "dredged spoil, solid waste . . ., biological materials . . ., heat . . ., rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). In certain circumstances, various federal courts have determined that the distinct, naturally-occurring and artificial constituents comprising a water body fall within the CWA's definition of "pollutant." *See, e.g., Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988) (citations omitted) (holding that dam-created fish remains constitute biological material pollutants); *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (accepting the EPA's judgment that pebbles, sand and other natural material may constitute regulable pollutants when discharged by mining operation).

human intervention have created two physically separate bodies of water. *See id.* at 291-98. As the two waters are separate, different sources will contribute to the overall constitution of each. Consequently, the separate bodies of water will possess varying chemical compositions, consisting of different types and ratios of organic and inorganic nutrients deposited by sources such as runoff, erosion, non-point source pollution, adjacent land use and exempted or previously permitted discharges. Raymond A. Young & Ronald L. Giese, *Introduction to Forest Science* 397-401 (2d ed. 1990). Similarly, each water will be influenced peculiarly by its own diverse topography, distinct tributaries, and heterogeneous substrate. Skinner & Porter, *supra*, at 292. These factors will produce varying flow rates among the waters, causing each to exhibit disparate temperatures, to produce distinct dissolved oxygen levels, and to possess a different capacity for carrying suspended solids. *Id.* at 272-79, 283-86; Young & Giese, *supra*, at 396-401. Finally, the different location of each water body will result in each water containing different types and amounts of biological material such as vegetative matter and animal remains.

Under the reasoning of *Miccosukee*, the simple act of re-combining these separated water bodies would be enough to require a NPDES permit. Indeed, under the Eleventh Circuit's "but for" test a regulable "addition of pollutants" occurs whenever any intra-system diversion structure moves water from one distinct body of water to another (a routine practice for water supply systems) even though no pollutants from the outside world have been added.

Amici are concerned that under *Miccosukee*, naturally occurring water constituents are transmogrified into regulable pollutants simply by flowing from one component of a water management system to another. Considering that every transfer of water also transfers that water's unique constituents (each of which would be classified as a "pollutant"), under the Eleventh Circuit's "but for" test, every discrete transfer of water within a water management facility will be considered an "addition of pollutants."

B. If Affirmed, the Eleventh Circuit's Holding Will Make it Very Difficult for Water Supply Facilities to Efficiently and Effectively Meet the Public's Critical Water Supply Needs.

The Eleventh Circuit's holding will have a national impact; it is not limited to the unique hydrologic ecosystem found in the Florida Everglades or to the discrete type of water conveyance before the Court. *Miccosukee*'s rationale would require a NPDES permit for every water diversion structure that transfers any amount of water from one water body into another distinct body of navigable water. The impact of this decision is especially significant in light of the wide spectrum of water management and supply facilities found throughout the nation that the Eleventh Circuit's rationale will subject to the NPDES permitting process for the first time. Within such myriad water management systems there are millions of water diversion structures that qualify as point sources.

Among the water management and supply projects of *Amici* that would be regulated under the Eleventh Circuit's rationale are: facilities that ensure public safety, such as dams and flood control systems; facilities that serve agriculture, such as irrigation supply systems; water supply facilities that provide an adequate amount of safe drinking water; and, ecosystem and species preservation programs such as those that regulate water flow from lakes and reservoirs into rivers and streams. *See* Skinner & Porter, *supra*, at 283 (discussing the wide variety of indispensable uses for water management and supply infrastructure). *Amici* are aware of countless examples where there is a diversion structure that, while technically qualifying as a point source under the CWA, operates without adding any pollutants from the outside world into the water flowing through it. Yet, under *Miccosukee*, all structures will be forced into the NPDES permitting process.

The water management and supply facilities located along the Colorado River provide but one example of the countless projects that the Eleventh Circuit's interpretation will subject to the time-consuming and expensive NPDES permitting process. The Colorado River contains various water management and supply infrastructure that were constructed between 1938 and 1964. *Id.* at 282. This infrastructure includes a system of dams, reservoirs, canals and 400 kilometers of aqueducts that perform a variety of critical functions throughout the Southwest United States. *Id.* at 282-83. The Parker Dam provides most of the municipal water supply for Los Angeles and San Diego. *Id.* at 283. The Imperial

Dam furnishes irrigation water to farms throughout the Southwest. *Id.* Three other dams along the river generate hydroelectric power that customers throughout the region use as their primary source of electricity. *See id.* Within this water management system, there are numerous diversions and conveyance structures that move water from the dams/reservoirs into other waters of the United States. Under the Eleventh Circuit's holding, each of these facilities would be subject to the onerous NPDES permit process.

The particular plight of other NPPC members further illustrates the scope of projects that will be pulled into the NPDES permit process.

In California, an intricate water transfer and delivery system known as the State Water Project ("SWP") supplies water to two-thirds of California's citizens. The SWP's supply of more than four million acre-feet of water per year is largely drawn from the Feather River watershed in Northern California and then transported south by means of the Sacramento-San Joaquin River Delta, where the SWP water is commingled with water from the watersheds of the Sacramento River, American River, Stanislaus River, Mokelumne River, San Joaquin River, and many others. These diverse bodies of water each have different chemical compositions, including vastly different levels of phosphate, suspended solids, and other federally-recognized pollutants. As it moves south, SWP water is diverted to water districts throughout California, where it is often mixed again with local water supplies, which have their own unique chemical compositions.

If the *Miccosukee* decision stands, the transport and distribution of SWP water will become bogged down in a costly and time-consuming regulatory morass. Merely counting the number of times SWP water is combined with water from another distinct source during its trip south would be a challenge. The prospect of obtaining a separate NPDES permit for each of these combinations is a regulatory nightmare that would dramatically increase regulatory compliance costs and could force the State to rethink its entire water distribution system.

For example, the Wheeler Ridge-Maricopa Water Storage District, Kern County, California, which obtains most of its water supply via the California Aqueduct directly from the State Water Project, provides 197,088 acre-feet of water that is allocated and distributed to 72,074 acres of farm lands within the District's Surface Water Service Area under long-term agricultural water contracts. The District has an annual budget of $28.4 million. While most of the District's water supply comes from interbasin transfers under the SWP, the District has also been forced to secure additional dry year water supplies for its landowners from the Kern Water Bank, Pioneer Project and Berrenda Mesa Project. These projects lie along the Kern River and utilize flood flows and excess water supplies from that River, the Central Valley Project (which is an interbasin from the San Joaquin River watershed into Kern County) and the SWP. The District is very concerned over the delays, cost increases and restrictive permit conditions that could arise from NPDES permitting in both wet and dry years.

Another California agency and NPPC member, the West Valley Water District in Rialto, would face similar burdens. The District obtains its surface water from a small water body known as Lytle Creek which is a designated cold water stream by the Regional Water Quality Control Board. The creek water is normally diverted and used for the operations of electricity before it is distributed to water agencies through diversion. The District blends creek water with SWP furnished by a State Water Contractor who wholesales water to local agencies. At times, the District must divert its water back into the creek. If NPDES permits were required for these diversions, the District estimates that it would have to add other types of treatment prior to discharge back into the creek or for groundwater storage and recovery at substantial additional expense.

The impact of the Eleventh Circuit's decision on Metropolitan Denver, one of the fastest growing areas in the United States, would also be quite significant. The Metro Denver Water Authority ("MDWA"), serving suburbs within the Metropolitan Denver area, is supported by annual membership assessments based on the number of water and/or sewer taps provided. Most of the Authority member communities obtain their raw or treated water from the City of Denver. That city gets its water from watersheds including the South Platte, east of the Continental Divide, and the Colorado River, west of the Continental Divide, and shares it with its suburban customers. Denver then bills MDWA's members, whose rates include the costs of infrastructure and delivery. The additional costs of

NPDES permits that Denver would have to obtain for inter-basin transfers would undoubtedly be passed on to MDWA's customers.

C. The NPDES Permit Process is Costly and Time-Consuming.

The burdens that the *Miccosukee* court's interpretation will impose on *Amici's* numerous water management and supply systems will be extreme. Under the Eleventh Circuit's expansion of NPDES permit jurisdiction, each of these facilities will be forced to shoulder the substantial financial and temporal burdens of acquiring a permit[5] and complying with its terms. In turn, new responsibilities will also fall heavily on state agencies, given that 44 states have assumed the NPDES permit program under the CWA. *See* Department of Interior, Office of the Inspector General (OIG), *EPA State Enforcement of Clean Water Act Discharges Can Be More Effective* 8 (2001).

An Environmental Protection Agency ("EPA") study on the financial and temporal burdens

[5] NPDES permit applications require parties to develop a complex data base to address issues such as water quality-based effluent limitations, monitoring and reporting of existing water quality conditions, best management practices, compliance schedules and various other procedures. *See* 40 C.F.R. § 122.21 (2002). This process also involves notice to the public with an opportunity for the public to challenge proposed permits at the administrative level – an undertaking that can render the NPDES permitting process interminable. *See* 40 C.F.R. §§ 124.10–124.14 (2002).

associated with simply acquiring a NPDES permit sheds some light into the costs that applicants and states will incur while negotiating the regulatory hoops of the permitting process.[6] EPA's data estimates that the total annual temporal burden to NPDES permit applicant respondents is approximately 1,990,775 hours – with an estimated 43,373 hours allocated to recordkeeping alone.[7] State governments will also commit significant resources in responding to permit application requests.[8] Permit applicants and state governments shoulder a hefty financial burden as well. The EPA study estimates that the total permitting cost to applicants is approximately $62,769,756.20 per year.[9] Notably, this figure accounts primarily for labor costs alone.[10] Further, state governments must shoulder an estimated cost of $1,289,488.89 each year.[11] All told, the EPA report anticipates that applicants and state governments will invest an

[6] *See* EPA, *Information Collection Request For Applications For National Pollutant Discharge Elimination System Discharge Permits and the Sewer Sludge Management Permits* (Final Draft), OMB No. 2040-0086, EPA ICR No. 0226.15 (1999), *available at* <http://www.epa.gov/icr/icrs/icrpages/0226ss15.htm>.

[7] *Id.* § 6(a)(i).

[8] EPA concludes that applicants and state governments together incur 2,038,694 hours in total burden attributed to the NPDES permitting process. *See id.* § 6(a)(iii).

[9] *Id.* § 6(b)(i).

[10] *See id.*

[11] *See id.* § 6(b)(ii).

estimated total of $64,059,245.10 to comply with the existing NPDES permitting process.[12]

In a separate study, EPA collected data to estimate the financial and temporal burdens associated with NPDES permit compliance assessments.[13] In this study, EPA determined that responding permittees incurred a total annual burden of 975,175 hours – 827,968 hours for recordkeeping and 147,207 hours for reporting.[14] The study also revealed that the responding permittees shouldered a staggering financial burden in the process of assessing compliance with their permits. EPA estimated that the total annual cost for permittees to conduct these compliance assessments amounted to approximately $23,046,452.[15] Importantly, this study and the ICR NPDES applicant study, *supra*, indicate only a portion of the immense financial and temporal investments inherent to the NPDES permitting

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[12] *See id.* § 6(b)(iii).

[13] This study pertains only to agencies, states and permittees determining the burdens associated with compliance assessments; it does not account for the mountainous investment of resources required to maintain actual compliance with NPDES permits. *See* EPA, *Information Collection Request for the National Pollutant Discharge Elimination System (NPDES)/Compliance Assessment/Certification Information* (Draft), OMB Control No. 2040-0110, EPA ICR No. 1427.06 § 1.b (July 2000), *available at* <http://www.epa.gov/icr/icrs/icrpages/1427ss06.htm>.

[14] *See id.* § 6.a.

[15] *See id.* § 6.d.

process. These studies represent only a fraction of the burdens that the Eleventh Circuit's "but for" test will thrust upon countless water management and supply facilities for the first time.

Amici submit that much of the inevitable financial burden of increased NPDES permits will ultimately fall on the shoulders of the American taxpayers. Parties that cannot bear the costs or meet the standards under NPDES (*e.g.*, effluent limitations, monitoring requirements) would be forced to alter or abandon their operations – possibly jeopardizing the supply of adequate drinking water in large cities, interrupting the flow of water to irrigation-dependent farms, disrupting the operation of flood control facilities that pump out encroaching water from populated areas, and encumbering efforts to protect threatened and endangered species and to preserve critical habitat. Hence, the American public will be forced to accept the aggregation of public safety risks associated with the possible disruption of flood control operations, the potential risk of an inadequate drinking water supply, and the seasonal impacts of the hydrologic cycle on irrigation-dependent agriculture.

II *MICCOSUKEE* IMPROPERLY MERGES TWO COMPLEMENTARY, BUT DISTINCT, MANDATES OF THE CWA.

By requiring water management agencies such as SFWMD to address the pre-existing "pollutants" that are found in the waters that they seek to divert, the Eleventh Circuit improperly merges two complementary, but distinct, mandates

under the CWA. In effect, *Miccosukee* has enlarged the regulatory scope of the NPDES permit to require water management agencies to address "non-point sources" of pollution, which are traditionally regulated by states and localities under different CWA standards and requirements.

The NPDES permit program is not intended to address all potential sources of water pollution in our nation's waters. Indeed, NPDES is solely applicable to facilities that discharge pollutants from "point sources." *See* 33 U.S.C. § 1342. Other provisions of the CWA address "non-point" sources of pollutants. Non-point source pollution comes from a wide variety of human activities in the watershed as water runs off or moves through the ground, such as "runoff from farmlands, mining activity, housing construction projects, roads, and so on." *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002). Non-point sources generally "cannot be regulated by permits because there is no way to trace the pollution to a particular point, measure it, and then set an acceptable level for that point." *Id.* at 1025.

Addressing non-point source pollution is considerably more complex than "end of the pipe" NPDES permitting. Pursuant to CWA § 303(c), states must establish water quality standards and submit those standards to the EPA for review. *See* 33 U.S.C. § 1313(a)-(c)). To determine the water quality standards, the state designates a use for a particular body of water and then determines the level of water quality required to achieve that use. *See id.* § 1313(c)(2)(A).

Section 303(d) requires the EPA and the states to identify those water segments that are unable to meet water quality standards using traditional technology-based effluent limitations (i.e. permits) on point sources. *See id.* § 1313(d). These "impaired" water segments must be ranked according to the severity of their water quality problems. *See id.* States must then establish a Total Maximum Daily Load ("TMDL") for each pollutant that impairs the water segment and submit that list to EPA for approval. *See id.* § 1313(d)(2). "A TMDL is a specification of the maximum amount of a particular pollutant that can pass through a waterbody each day without water quality standards being violated." *Meiburg*, 296 F.3d at 1025 (citing 33 U.S.C. § 1313(d)(1)(C)).

Miccosukee ignores the division between point and non-point sources of pollution and fails to consider the ramifications this merger will have by forcing parties such as *Amici's* members to address non-point source pollutants. Under *Miccosukee*, a party that transfers water becomes responsible for its physical characteristics by doing nothing more than redirecting such water. Water management facilities will be forced to obtain NPDES permits and to retrofit their facilities to address pre-existing (and changing) water quality conditions despite having

added nothing to such water.[16] This is inconsistent with the CWA and fundamentally inequitable.

III. THE ELEVENTH CIRCUIT'S BROAD INTERPRETATION OF "ADDITION OF POLLUTANTS" VIOLATES THE FUNDAMENTAL PRINCIPLE OF FEDERALISM THAT ABSENT A "CLEAR STATEMENT" FROM CONGRESS, A REVIEWING COURT SHOULD NOT SANCTION USURPATION OF STATE AND LOCAL CONTROL OF LAND AND WATER RESOURCES

In requiring SFWMD to acquire a NPDES permit for a simple redirection of water, the Eleventh Circuit adopted an unprecedentedly broad interpretation of the statutory term "addition." As the Court held recently in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001) ("*SWANCC*"), in a decision construing the geographic scope of CWA jurisdiction, the courts should be hesitant to intrude upon the delicate balance between federal and state regulation of land and water resources absent a "clear statement from Congress" that it

[16] Parties that obtain individual NPDES permits must meet certain effluent limitations, which are limits on the amount of pollutants that may be discharged. *See* 33 U.S.C. § 1311. Hence, the NPDES permit could be used to require the water management authority to remediate existing pollutants which are ever-changing, depending on up-stream conditions.

intended such a result. Just as it did when setting the geographic boundaries of jurisdiction, Congress did not seek to impinge on the States' traditional and primary power over land and water use when setting out the scope of activities regulated under the CWA.

A. Nothing In The CWA Evinces A Clear Statement That Congress Intended To Encroach Upon Local Regulation of Water Management and Supply Activities That Do Not Add Pollutants

One of the principal tenets of federalism is that courts shall not interpret federal legislation to abrogate local power unless it is clear that Congress considered and intended, when it passed the authorizing legislation, to alter the traditional balance between federal and state powers. This "clear statement" principle applies "in cases implicating Congress's historical reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States." *United States v. Lopez*, 514 U.S. 549, 611 (1995) (Souter, J., dissenting) (citation omitted). In cases where a court seeks to invoke the outer limits of Congress's power, there must be a clear indication that Congress intended that result. *See SWANCC*, 531 U.S. at 172. Indeed, this Court has recognized that there is an underlying assumption that the power to legislate in areas traditionally regulated by the States "is an extraordinary power . . . . [that] Congress does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

Of course, as long as Congress is acting pursuant to one of its enumerated powers, the Supremacy Clause of the Constitution permits Congress to trump state law, even in areas (such as land and water use) that by tradition fall within the state sphere. Nonetheless, under the "clear statement" principle, courts must not simply assume that Congress has used its power to override state authority. *See SWANCC*, 531 U.S. at 172-73. Rather, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). Mere ambiguity will not suffice to demonstrate that Congress intended to intrude into state interests. *See Gregory*, 501 U.S. at 464.

Miccosukee's intrusion into water supply projects will clearly upset the "cooperative federalism" inherent in the CWA. Section 101 of the CWA specifically limits the authority of federal agencies to intrude into state and local matters:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. . . .

33 U.S.C. § 1251(b). Congress also explicitly stated that nothing in the CWA is to "be construed as impairing or in any manner affecting any right or

jurisdiction of the States with respect to the waters . . . of such States." *Id.* § 1370(2).[17]

The division between the regulation of point and non-point source pollutants reflects this dual approach to reaching the CWA's lofty goals. "In so doing, the CWA uses distinctly different methods to control pollution released from point sources and that traceable to nonpoint sources." *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002) (citation omitted). While NPDES is based on "technological controls to limit the pollution point sources may discharge" the CWA "provides no direct mechanism to control nonpoint source pollution but rather uses the 'threat and promise' of federal grants to the states to accomplish this task," consistent with CWA § 101. *Id.* at 1126-27 (citations omitted).

A review of the plain language of the CWA provides nothing approaching a "clear statement" from Congress that it intended the CWA to regulate all intra-system water movement activities that somehow affect water quality. In truth, far from being "unmistakably clear" that Congress intended the statutory term "addition of pollutants" to encompass everyday activities such as water management or other routine water supply projects, Congress set forth the very specific limit that regulated activities must result in an "addition" of material in order to fall within the ambit of the CWA's NPDES control. The "pollutants" that *Miccosukee* would have regulated are more properly

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[17] *See also* 33 U.S.C. § 1288 (encouraging states to develop area-wide management plans).

addressed under the TMDL program. This careful balance between state and federal power should not be upset.

B. The States Have Enacted Comprehensive Water Quality Protection Statutes That Will Be Supplanted by this Expansion Of the CWA

Amici recognize the legitimate objective of the CWA to protect the Nation's waters. However, § 402 of that Act does not cover all water movement activities that could potentially impact water quality. Fundamental principles of federalism dictate that activities such as water management, irrigation and drinking water supply, flood control and other routine water transfer uses are properly within the purview of state and local governments. Indeed, the Court has recognized that the CWA "establishes a distinctive variety of cooperative federalism" which authorizes a State to "administer" its own permit system that complies with federal statutory and regulatory requirements. *See U.S. Dept. of Energy v. Ohio*, 503 U.S. 607, 633 (1992); *see also Pronsolino*, 291 F.3d at 1140. As discussed above, the CWA bestows "primary" responsibility upon the states to protect water resources. The literally thousands of state and local governments that regulate navigable waters evidences that the

States have assumed this role.[18]

State-based clean water laws are typically far broader than their federal counterpart – regulating a wider spectrum of water management and supply projects. Of particular relevance to *Amici*, California's Porter-Cologne Act requires any discharger or potential discharger that "could affect the quality of the waters of the state . . ." to report the activity to a regional clean water control board. *See* Cal. Water Code § 13260(a)(1). The board then issues permit-like waste discharge requirements that account for water quality objectives, other waste discharges, the necessity of preventing discharge-related nuisances, and the beneficial uses the board seeks to protect. *See id.* § 13263. As its primary operative mechanisms, the Act prohibits any discharge of waste before a potential discharger files a report with the regional board and provides abatement authority to remedy unapproved discharges. *See id.* §§ 13264, 13304(a). In Colorado, the Water Quality Control Act establishes a state water quality control commission. Colo. Rev. Stat. § 25-8-101 *et seq*. The commission has the duty of setting state water quality standards and may promulgate "precautionary measures, both mandatory and prohibitory, that must be taken by . .

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[18] *See Federal Wetland Protection Policy, 1993: Hearings on S. 1304 Before the Subcomm. On Clean Water, Fisheries and Wildlife of the Senate Comm. on Environment and Public Works,* 103d Cong. (1993) (statement of National Association of State Departments of Agriculture), *available* in LEXIS, Legis Library, Cngtst File.

. any facility, process, activity or waste pile that does cause or could reasonably be expected to cause pollution of any state waters in violation of control regulations or . . . any applicable water quality standard . . . ." *See id.* §§ 25-8-204, 25-8-205(1)(c). Similarly, Georgia's water pollution control law assigns to the state's Environmental Protection Division the responsibility "to regulate the withdrawal, diversion, or impoundment of the surface waters of the state . . . ." Ga. Code Ann. § 12-5-21(b). The law also establishes a state board with the authority to promulgate water quality standards and associated rules to address any water quality need on a state, regional, or local level. *See id.* § 12-5-23(a)(1).

Additional examples abound of state-based water pollution control laws that exceed CWA requirements. Florida's water pollution control law broadly defines "waste" to include "substances which may pollute or tend to pollute any waters of the state" and forbids any unauthorized discharge into state waters of "any waste which, by itself or in combination with the wastes or other sources, reduces the quality of the receiving waters below the classification established for them." *See* Fla. Stat. ch. 403.031(12), 403.088(1). Pennsylvania takes an equally broad approach with its Clean Streams Law, prohibiting any person or municipality from discharging "any substance of any kind or character resulting in pollution . . . ." *See* 3 Pa. Cons. Stat. § 691.401. Notably, the Pennsylvania statute's definition of "pollution" encompasses "contamination of any waters . . . including but not limited to such contamination by alteration of the physical, chemical

or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of any liquid, gaseous, radioactive, solid, or other substances into such waters." *Id.*

In a similar vein, all fifty states, the District of Columbia, and the Commonwealth of Puerto Rico, have enacted laws that apply to non-point source discharges. *See* Environmental Law Institute, *Almanac of Enforceable State Laws to Control Nonpoint Source Water Pollution*, 1 (1998). The states fill a critical role in the overall scheme of the CWA.

> Nonpoint source discharges, which consist generally of polluted runoff from farms, forests, land development and other activities, are not regulated under the federal Clean Water Act's National Pollutant Discharge Elimination System permitting program. Instead they are addressed primarily through nonregulatory means, such as planning, incentive and cost-share mechanisms . . . . Yet, increasingly, states are finding it necessary to deal with nonpoint source discharges that cannot be prevented, controlled, or abated adequately by these means.

Id.

Well aware of the comprehensive state-based initiatives discussed above, the EPA has also recognized the essential role of federalism in the

protection of water resources even as to the permitting of point source discharges, explaining:

> More than a dozen States already are currently administering aquatic resources/wetlands protection programs similar to the [Clean Water Act permitting] program. This makes sense because State and Tribal regulators are, in many cases, located closer to the proposed activities and are often more familiar with the local resources, issues, and needs than are Federal regulators.[19]

Thus, there are ample state and local protections in place to facilitate more creative and, therefore, less burdensome regulatory schemes than under the federal system.[20] Such initiatives are directly threatened by the Eleventh Circuit's expansive interpretation of the statutory term "addition of pollutants."

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[19] U.S. Environmental Protection Agency, Office of Wetlands, Oceans, and Watersheds, *State or Tribal Assumption of the Section 404 Permit Program* (May 25, 1999), *available at* http://www.epa.gov/owow/wetlands/facts/fact23.html.

[20] For example, unlike the CWA, certain states protect both surface and groundwater. *See, e.g.*, Cal. Water Code § 13050(e); 415 Ill. Comp. Stat. 5/3.550.

CONCLUSION

The *Amici* Nationwide Public Projects Coalition *et al.* respectfully request this Court to reverse the Eleventh Circuit's ruling in *Miccosukee*.

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